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U.S. Citizenship
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FILE: SRC 04 137 50548 Office: TEXAS SERVICE CENTER Date: MAR 30 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an asset management business that seeks to extend the employment of the beneficiary as a computer analyst and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director found that the beneficiary had reached the six-year maximum authorized period of admission as an H-1B nonimmigrant and denied the petition. On appeal, counsel asserts that the beneficiary is entitled to recapture 75 days he spent outside the United States during the validity of his H-1B petition.

In general, section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4), provides that “[t]he period of authorized admission [of an H-1B nonimmigrant] may not exceed 6 years.” [Emphasis added.] The regulation at 8 C.F.R. § 214.2 (h)(13)(iii)(A) states, in pertinent part, that:

An H-1B alien in a specialty occupation . . . who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless
[emphasis added].

Section 101(a)(13)(A) of the Act states that “[t]he terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer.” The plain language of the statute and the regulations indicate that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States. This conclusion is supported and explained by the court in *Nair v. Coultime*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001). It is further supported by a policy memorandum issued by the United States Citizenship and Immigration Services (USCIS) that adopts *Matter of I-*, USCIS Adopted Decision 06-0001 (AAO, October 18, 2005), available at: <http://uscis.gov/graphics/lawregs/decisions.htm>, as formal policy. See Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, Citizenship and Immigration Services, Department of Homeland Security, *Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants*. AFM Update AD 05-21 (October 21, 2005).

The record reflects that, on March 29, 2002, the director approved the petitioner’s previous H-1B extension request on behalf of the beneficiary until April 30, 2004. On April 15, 2004, the petitioner submitted the instant H-1B extension request. In a request for additional evidence, the director indicated that the beneficiary was not eligible for an extension of his H-1B status, as the labor certification application filed on his behalf had not been pending for at least 365 days at the time of the petition’s filing. The petitioner, through counsel, responded that, in accordance with *Nair v. Coultime*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001), the beneficiary should be permitted to recapture the 75 days he spent outside the United States during the six-year period, which would make the labor certification application pending for more than one year and, in turn, render the petition approvable.

The director denied the petition because the beneficiary had remained in the United States in H-1B status for six years and the petitioner had not satisfied the requirements for an extension of stay under the “American Competitiveness in the Twenty-First Century Act,” (AC21) and the Twenty-First Century Department of Justice Appropriations Authorization Act” (21st Century DOJ Appropriations Authorization Act). The director

determined that because fewer than 365 days had elapsed between when the petitioner filed the alien employment certification application (May 19, 2003) and the date the petition was filed (April 15, 2004), the beneficiary did not qualify for an extension of status. The director also found that, even though the beneficiary had not completed his six years of H-1B status until May 1, 2004, the beneficiary still was not eligible for an extension under AC21 because fewer than 365 days had elapsed between when the petitioner filed the alien employment certification application (May 19, 2003) and the date the beneficiary completed his six years of H-1B status (May 1, 2004). The director also determined that the beneficiary was not entitled to recapture those days spent outside the United States during the six-year period and extend his H-1B classification for 75 days, because *Nair v. Coultime*, 162 F. Supp. 2d 1209 (S.D. Cal. 2001) is a California court case and is not binding in the State of Texas. Accordingly, the beneficiary was not entitled to recapture those days and extend his H-1B classification for 75 days.

The record of proceeding before the AAO contains: (1) Form I-129 with supporting documentation, including a summary of the beneficiary's time spent outside the United States while in H-1B status, and copies of the beneficiary's passport pages; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

In accordance with the statutory and regulatory provisions previously cited, and the judicial decision in *Nair v. Coultime*, the AAO determines that the time the beneficiary spends in the United States after lawful admission in H-1B status is time that counts toward the maximum six-year period of authorized stay. The beneficiary in this case was admitted to the United States in H-1B status each time he returned from outside the country. When he was outside the United States he was not in any status for U.S. immigration purposes. Thus, the beneficiary interrupted his period of H-1B status when he departed the country, and renewed his period of H-1B status each time he was readmitted in the United States.

The AAO finds that the beneficiary is ineligible for an extension of status and to recapture the 75 days he spent outside the United States. Although the record contains copies of the beneficiary's passport reflecting his arrivals to the United States, the record contains no evidence of the departure dates, such as frequent flyer and/or airline ticket records. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes that the petitioner is in the best position to organize and submit proof of the beneficiary's departures from and reentry into the United States. Copies of passport stamps or Form I-94 arrival-departure records, without an accompanying statement or chart of dates the beneficiary spent outside the country, could be subject to error in interpretation, might not be considered probative, and may be rejected. Similarly, a statement of dates spent outside of the country must be accompanied by consistent, clear and corroborating proof of departures from and reentries into the United States. The petitioner must submit supporting documentary evidence to meet his burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.